

- (4) What is claimant's average weekly wage?
- (5) Is claimant entitled to temporary total disability compensation in excess of the 15 week healing period provided by statute?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds, for the reasons more fully explained below, that claimant sustained an injury at work on March 19, 1997, when a co-worker stepped on her foot. This injury caused a blister or ulceration on claimant's toe to rupture which, due to claimant's uncontrolled diabetic condition, led to infection, gangrene and ultimately the amputation of several toes and later the right leg below the knee. Claimant is entitled to workers compensation benefits as provided by the Act including permanent partial disability compensation based upon the agreed 100 percent loss of the lower leg.¹

On March 19, 1997 claimant was a full-time employee of what was then Treasury Drug, later Eckerd Drug. She worked as a cashier and a stocker. Claimant was assisting a co-worker, Leslie Lakatos, who was on a step-stool stocking shelves. When Ms. Lakatos stepped off the stool her foot landed on claimant's foot. Claimant said "ouch" and Ms. Lakatos asked claimant if she was okay. Claimant replied "I'm okay, but you stepped on my foot." Claimant described the area Ms. Lakatos landed on as her big toe and the two toes beside it on her right foot. The store manager, Elizabeth Santoyo, was present when this occurred.

Although claimant felt pain immediately, she was not aware of the broken blister until that evening at home when she removed her shoe. The blister was on her second toe. Over the next couple of weeks claimant had some problems with the foot but she could still walk. Claimant told her manager that her foot was sore from Ms. Lakatos stepping on it. As a result claimant asked Ms. Santoyo for the next few days off. She did not work the 20th, 21st and 22nd of March. Claimant returned to work on March 23rd. Claimant worked about four days that week and it was on or about March 25 when claimant asked for and received permission from Ms. Santoyo to just do cashier work. Ms. Santoyo had noticed claimant was having difficulty walking and told claimant she could sit to ring up customers. Claimant thereafter worked sitting on a stool until the last day she worked.

Before this accident claimant had already given respondent her two weeks notice that she was quitting. Claimant planned to work until April 5, 1997 but on March 29, 1997 claimant told her manager that she would not be able to continue working because of her foot. No medical treatment was offered to claimant by respondent.

¹ K.S.A. 1996 Supp. 44-510d(a)(15 and 18) and (b).

Thereafter, claimant suffered a series of setbacks in the treatment of her foot injury, due to her diabetes. On April 6, 1997 the two toes next to her big toe were amputated, followed shortly thereafter by the amputation of her foot and lower leg approximately two inches below her knee. Claimant denies any prior injuries to her right foot. She first noticed the blister on her toe about two weeks before the accident at work. During that period she did not notice any change in the blister.

Dr. Daniel D. Zimmerman testified that the cause of claimant's infection was the breaking of the blister on her second toe. If the blister had not ruptured, claimant would not have had the infection and eventual amputation. It is also probable that claimant's problem would not have resulted in amputation were it not for the uncontrolled diabetes. Dr. Zimmerman opined "But for the rupture of the blister on her right second toe causing gangrene affecting her right foot due to peripheral microvascular pathology associated with untreated diabetes mellitus, this amputation would be unlikely to have occurred. Thus, this amputation is directly attributable to employment and is work related." Dr. Zimmerman was the only physician to testify in this case.

It appears from the record that respondent never provided claimant with a wage statement. Claimant argues for an average weekly wage of \$180 based upon a 40 hour work week. But claimant testified she worked only four or five days a week from 9 a.m. until 4 p.m. or sometimes from 4 p.m. until closing. This constitutes an average of 31.5 hours per week at the hourly rate of \$4.50. Therefore, claimant is entitled to compensation based upon a gross average weekly wage of \$141.75.²

CONCLUSIONS OF LAW

Respondent contends claimant failed to provide timely notice of her accidental injury. Absent extenuating circumstances, K.S.A. 44-520 requires notice of accidental injury be given to the employer within 10 days. Claimant testified that the store manager, Elizabeth Santoyo, had actual knowledge of the incident and, in addition, claimant discussed her resulting injury with the store manager on more than one occasion thereafter. These conversations resulted in claimant's job duties being modified to accommodate her injury. This occurred within 10 days of the accident. Accordingly, the Appeals Board finds claimant gave timely notice of accident.

Respondent also denies claimant has proven she suffered personal injury by accident arising out of and in the course of her employment. Respondent contends claimant's injury is not related to any alleged accident at work but, instead, is the result of her uncontrolled diabetes mellitus. Generally, workers compensation laws require an employer to compensate an employee for personal injury or aggravation of a preexisting

² K.S.A. 44-511(b)(4)(B).

condition that is incurred through accident arising out of and in the course of employment.³ The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.⁴ The Appeals Board has resolved this fact question in claimant's favor. Based upon claimant's testimony and the medical evidence the Appeals Board finds that claimant's amputation injury is directly traceable to the accident at work.⁵ Workers compensation benefits, therefore, should be paid by respondent and its insurance carrier including an award of temporary total disability compensation for the period from March 29, 1997 through August 1, 1997 and permanent partial disability compensation based upon the stipulated 100 percent scheduled injury to the right lower leg together with the statutory 15 week healing period. Finally, as respondent did not provide claimant with medical treatment, all of claimant's reasonable and related medical expenses should be treated and paid as authorized medical.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated February 25, 1999 should be, and is hereby, reversed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Alice T. Ruiz, and against the respondent, Eckerd Drug, and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred March 19, 1997, and based upon an average weekly wage of \$141.75 for 17.71 weeks of temporary total disability compensation, for the period from March 30, 1997 through July 31, 1997, at the rate of \$94.50 per week or \$1,673.60, followed by 187.29 weeks at the rate of \$94.50 per week or \$17,698.91, for a 100% permanent partial scheduled injury to the right lower leg, making a total award of \$19,372.51.

As of January 20, 2000, there is due and owing claimant 17.71 weeks of temporary total disability compensation at the rate of \$94.50 per week or \$1,673.60, followed by 129.15 weeks of permanent partial compensation at the rate of \$94.50 per week in the sum of \$12,204.68 for a total of \$13,878.28, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$5,494.23 is to be paid for 58.14 weeks at the rate of \$94.50 per week, until fully paid or further order of the Director.

³ K.S.A. 1996 Supp. 44-501(a); Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 2, 899 P.2d 1058 (1995); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987).

⁴ Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

⁵ See Cox v. Ulysses Cooperative Oil & Supply Co., 218 Kan. 428, 544 P.2d 363 (1975).

Respondent is ordered to pay all reasonable and related medical expenses.

Future medical is awarded upon proper application to and approval by the Director.

An unauthorized medical allowance of up to \$500 is awarded upon presentation to respondent of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Metropolitan Court Reporters, Inc.	
Transcript of Regular Hearing	\$294.40
Hostetler & Associates, Inc.	
Deposition of Daniel D. Zimmerman, M.D.	\$211.05
Deposition of Elizabeth Santoyo	119.70
Deposition of Leslie Lakatos	222.90

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Jarrett, Overland Park, KS
David Menghini, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director